

MILBERG WEISS LLP  
JEFF S. WESTERMAN (SBN 94559)  
ELIZABETH P. LIN (SBN 174663)  
One California Plaza  
300 S. Grand Ave., Suite 3900  
Los Angeles, CA 90071-3172  
Telephone: (213) 617-1200  
Facsimile: (213) 617-1975  
Email: jwesterman@milbergweiss.com  
elin@milbergweiss.com

MILBERG WEISS LLP  
GEORGE A. BAUER III  
ANITA KARTALOPOULOS  
One Pennsylvania Plaza  
New York, NY 10119  
Telephone: (212) 594-5300  
Facsimile: (212) 868-1229  
Email: gbauer@milbergweiss.com  
akartalopoulos@milbergweiss.com

KROLL HEINEMAN GIBLIN, LLC  
VINCENT M. GIBLIN  
99 Wood Avenue South, Suite 307  
Iselin, NJ 08830  
Telephone: (732) 491-2100  
Facsimile: (732) 491-2120  
Email: vgiblin@krollfirm.com

Counsel for Lead Plaintiff

Lead Counsel for the Class

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

RICHARD GREGORY, On Behalf of Himself )  
and All Others Similarly Situated, )

Plaintiff, )

vs. )

CHIRON CORPORATION, HOWARD H. )  
PIEN, JOHN A. LAMBERT and DAVID V. )  
SMITH, )

Defendants. )

Case No. C-04-4293-VRW

CLASS ACTION

**LEAD PLAINTIFF'S (1) RESPONSE TO  
PROPOSAL FOR EVALUATION OF THE  
PROPOSED SETTLEMENT BY SPECIAL  
MASTER AND (2) REQUEST FOR  
STATUS CONFERENCE**

LEAD PLAINTIFF'S RESPONSE TO PROPOSAL; REQUEST FOR STATUS CONFERENCE

CASE NO.: C-04-4293-VRW

DOCS\427484v3

1 **I. INTRODUCTION**

2 On February 14, 2008, at a Case Management Conference with the parties, the Court  
 3 suggested the retention of a special master and in particular, Michael A. Perino ("Perino") to (1)  
 4 advise the Court with respect to the reasonableness of the settlement, including the terms and  
 5 conditions of the settlement and the fee and cost award being proposed; and (2) advise the Court  
 6 with respect to an appropriate form of notice to members of the class that would elicit a  
 7 meaningful response from members of the class. See 2/14/08 Transcript, at 3:17-25. The Court  
 8 invited comment from the parties by March 17. For the following reasons, Lead Plaintiff does  
 9 not believe Perino is the appropriate person, due to potential or actual conflicts posed by his  
 10 engagements. Lead Plaintiff also notes that it may be possible to cost-effectively use publicly  
 11 available data, as discussed below. Lead Plaintiff suggests a status conference to discuss the  
 12 master concept further, and welcomes discussion about concepts for class notice. Depending on  
 13 the Court's view at the status conference with regard to these issues, Lead Plaintiff is inclined to  
 14 request permission to resubmit a motion for preliminary approval of the settlement, addressing  
 15 the issues previously raised by the Court's order of November 30, 2007.

16 **II. SELECTION OF A MASTER**

17 **A. Perino's Other Engagements Pose Conflict Concerns**

18 Lead Plaintiff does not believe Perino should be retained to evaluate the settlement  
 19 because his past and current engagements raise conflict concerns.

20 Perino currently serves as an expert for a group of class members objecting to a proposed  
 21 fee in connection with a \$400 million settlement in *In re Qwest Communications International,*  
 22 *Inc. Sec. Litig.*, No. 01-cv-1451-REB-PAC (D. Colo. May 15, 2006). Class counsel in this  
 23 action, Milberg Weiss, was one of the firms that filed and litigated the *Qwest* action on behalf of  
 24 the plaintiffs and has an interest in the fees and costs from the settlement, which was recently  
 25 appealed and remanded. Thus, Milberg Weiss has an interest in, and Perino is currently on the  
 26 opposing side of, an issue in active litigation due to *Qwest*.

27 Perino also consults for Bank of America Corp. Bank of America is a named defendant  
 28 in an action currently pending in California state court in connection with its proposed merger

1 with Countrywide, in which class counsel, Milberg Weiss, is co-lead counsel in the case. *See In*  
 2 *re Countrywide Financial Corp. Shareholder Deriv. Litig.*, Case No. BC375275 (Cal. Sup. Ct.).  
 3 Bank of America has also been a defendant in other litigation where Milberg Weiss was counsel.

4 Likewise, Perino consults for investment banks including Morgan Stanley Dean Witter,  
 5 which have been defendants in securities class actions, including pending actions currently  
 6 handled by Milberg Weiss. *See, e.g., In re Initial Public Offering Sec. Litig.*, 21 MC 92 (SAS)  
 7 (S.D.N.Y.); *see also In re Morgan Stanley ERISA Litigation* Case No. 07-cv-11624 (S.D.N.Y.)  
 8 (currently pending, Milberg Weiss is co-lead counsel).

9 Perino also counts insurance companies such as National Union Fire Insurance Company  
 10 and New York Life Insurance Company as his clients. Because insurance companies generally  
 11 have an interest in minimizing the payouts and fees in securities class actions, this also raises  
 12 potential, if not actual, conflicts. National Union is frequently the insurer of claims in securities  
 13 class actions, with a direct or indirect role in negotiating settlements to minimize their exposure.

14 Perino also consults for the American Electronics Association (“AEA”), a trade  
 15 association that represents the technology industry. *See* [www.aeanet.org](http://www.aeanet.org). The AEA is an  
 16 outspoken critic of private securities litigation and has actively sought to narrow its scope,  
 17 including by submitting an amicus curiae brief arguing for a higher scienter standard in *In re*  
 18 *Silicon Graphics, Inc. Sec. Litig.*, No. C-96-0393 FMS (N.D. Cal.). Also, when the Securities  
 19 Uniform Standards Act was passed by Congress, AEA issued a press release entitled “AEA Hails  
 20 Huge Victory for High Tech Industry” in which it derided securities lawsuits.

21 While Perino’s credentials and background are substantial, all of these factors create too  
 22 many issues to use Perino as a master in this case.

23 Lead Plaintiff is inclined to request another status conference with the Court to have  
 24 either further discussions regarding a master, or a schedule to file another preliminary approval  
 25 motion that addresses the issues previously raised by the Court’s order of November 30, 2007,  
 26 and any class notice ideas the Court may want considered.

**B. The Cost Benefit of Utilizing Publicly Available Settlement and Fee Data Should be Explored.**

Lead Plaintiff is concerned that the costs of retaining a master will reduce the amount of proceeds from the settlement received by the Class. There are several organizations that publish extensive data, some of it publicly, without charge, and counsel are willing to work with the Court to determine the availability of these datasets. It is believed that some, if not many, of these compilations are also utilized by institutional investors regarding their roles in securities litigation. Perino's basic research is also publicly available, setting aside whether his conclusions are applicable.

For example, Perino has used a dataset that he describes as derived from "settlements [] identified using Institutional Shareholder Service's Securities Class Action Services' database (ISS), which appears to be comprehensive database of securities class action settlements." Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions* ("Markets and Monitors"), January 2006, at 12; Michael A. Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions* ("Institutional Activism"), October 2006, at 14. Whether the ISS database is accurate and comprehensive, or whether it only selects certain limited data or cases for inclusion, are issues that should be examined, but it may be available in a cost effective manner.

Further, while Perino apparently maintains a dataset of securities class action settlements that he used in various studies, he does not appear to use a complete set, or the same set, for each study he performs. For example, in *Markets and Monitors*, Perino stated that for the cases analyzed in his paper, he used a "random sample of 244 post-PSLRA securities class action settlements entered into between *April 1997 and May 2005*, inclusive." *Markets and Monitors*, at 12. Then, in *Institutional Activism*, Perino stated that he used a "random sample of 627 pre- and post-PSLRA settlements" including a "random sample of 126 pre-PSLRA and 501 post-PSLRA settled securities fraud class [sic] filed from *1984 through 2004*." *Institutional Activism*, at 14. Then, in a declaration dated only a month after *Institutional Activism*, in objecting to the

1 settlement in *In re Adelpia Communications Corp. Sec. & Deriv. Litig.*, Case No. 03 MD 1529  
 2 (LMM) (S.D.N.Y. Nov. 13, 2006), Perino attested that he had a dataset of 547 reported and  
 3 unreported federal district court fee decisions in securities class actions which covered fee  
 4 decisions from **1994 through 2006**. Declaration of Professor Michael A. Perino in Support of  
 5 Objector New York State Teachers' Retirement System, at 4. Thus, it appears that the number of  
 6 cases and the time period of the cases used by Perino for his studies and declarations regarding  
 7 settlements have varied. It seems likely that the level of detail in reported and unreported  
 8 decisions also varies.

9 In short, the time and expense necessary to determine the accuracy, comprehensiveness,  
 10 and objectivity of a master's dataset, along with the reasons for any selectivity, and whether  
 11 individual case information includes or excludes certain data, could be significant, require an  
 12 additional expert for advice, and possibly overshadow the benefits.

### 13 **C. There are Issues Unique to the Court's Role in This Case**

14 A master here could not evaluate a key aspect of the settlement, which is uniquely within  
 15 the knowledge of the Court – *i.e.*, the value of the settlement in light of the Court's view of the  
 16 motion to dismiss that was pending when the case settled. This information is not public – and  
 17 may never be – but it highlights a risk factor to all parties in the case, and it was factored into all  
 18 parties' settlement decision. No master would have the insight of the Court to weigh this factor.  
 19 This is significant because, here, the Chiron defendants adamantly assert that this is a “no  
 20 liability” case.

21 Additionally, it is unclear what role any master would, or could, have in evaluating the  
 22 fee, or a lodestar “cross check” in light of the Court's discussion in the November 30, 2007  
 23 Order, which Lead Plaintiff and Lead Counsel were assuming they would need to address if a  
 24 motion for preliminary approval is re-filed. Would a Master's assignment include the ability to  
 25 make a recommendation contrary to the Court's view of the cross check? Interestingly, Perino's  
 26 work appears to lean against the significance of a cross check. According to Perino, “empirical  
 27 research has shown that lodestars have little or no explanatory power in predicting fee awards ...  
 28

1 settlement size[] is the single most important determinant of fee size.” Perino *Adelphia* Decl., at  
 2 6 n. 5.<sup>1</sup>

3 **III. LEAD PLAINTIFF REQUESTS FURTHER DISCUSSION REGARDING**  
 4 **CLASS NOTICE**

5 During the CMC on February 14, 2008, the Court also suggested that a master be used to  
 6 advise the Court regarding an appropriate notice that would elicit a meaningful response from  
 7 class members. We are open to further discussion and ideas on this issue.

8 **IV. CONCLUSION**

9 Lead Plaintiff respectfully requests a further status conference to discuss possible  
 10 alternatives to Perino, modifications to the traditional class notice and a motion for preliminary  
 11 approval.

12 DATED: March 17, 2008

MILBERG WEISS LLP  
 JEFF S. WESTERMAN  
 ELIZABETH P. LIN

13  
 14 /s/ Jeff S. Westerman  
 Jeff S. Westerman

15 One California Plaza  
 16 300 South Grand Avenue, Suite 3900  
 17 Los Angeles, CA 90071  
 18 Telephone: (213) 617-1200  
 19 Facsimile: (213) 617-1975  
 20 Email: jwesterman@milbergweiss.com  
 21 elin@milbergweiss.com

MILBERG WEISS LLP  
 GEORGE A. BAUER III  
 ANITA KARTALOPOULOS

22 <sup>1</sup> According to various studies, including ones cited by Perino, 25% appears within the  
 23 appropriate percentage fee range for a settlement like this. For example, an independent study  
 24 conducted in 2005 by the National Economic Research Association, Inc. (NERA) found that in  
 25 cases with a common settlement fund of \$25 million to \$100 million, the average percentage of  
 26 attorneys’ fees awarded is 26%. Elaine Buckberg, Todd Foster & Ronald I. Miller, *Recent*  
 27 *Trends in Shareholder Class Action Litigation: Are Worldcom and Enron the New Standard?*  
 28 July 2005, at 7. Perino relied on this study in his *Adelphia* declaration. Perino *Adelphia* Decl., at  
 7-8. Similarly, in his *Qwest* declaration, Perino indicated that 23.17% was the mean, and 25%  
 was the median, fee award in cases where the settlement resulted in a settlement of \$25-\$75  
 million, based on a sample of 525 federal district court fee decisions from 1994 through 2006.  
 Perino *Qwest* Decl., at 11.

One Pennsylvania Plaza  
New York, NY 10119  
Telephone: (212) 594-5300  
Facsimile: (212) 868-1229  
Email: gbauer@milbergweiss.com

Lead Counsel for the Class

KROLL HEINEMAN GIBLIN, LLC  
VINCENT M. GIBLIN  
99 Wood Avenue South, Suite 307  
Iselin, NJ 08830  
Telephone: (732) 491-2100  
Facsimile: (732) 491-2120  
Email: vgiblin@krollfirm.com

Counsel for Lead Plaintiff

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, employed in the County of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is One California Plaza, 300 South Grand Avenue, Suite 3900, Los Angeles, California 90071-3149.

2. That on March 17, 2008, declarant served the **LEAD PLAINTIFF'S RESPONSE TO PROPOSAL FOR EVLUATION OF THE PROPOSED SETTLEMENT BY SPECIAL MASTER** by depositing a true copy thereof in a United States mailbox at Los Angeles, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

4. That on the above date, declarant served via e-mail to: scac@law.stanford.edu.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of March, 2008, at Los Angeles, California.

  
ELIZABETH VILLALOBOS



**CHIRON CORPORATION**  
**SERVICE LIST**

***Counsel for Plaintiffs***

Jeff S. Westerman  
Elizabeth P. Lin  
MILBERG WEISS LLP  
One California Plaza  
300 S. Grand Avenue, Suite 3900  
Los Angeles, CA 90071  
Telephone: (213) 617-1200  
Facsimile: (213) 617-1975

George A. Bauer III  
Anita Kartalopoulos  
MILBERG WEISS LLP  
One Pennsylvania Plaza  
New York, NY 10119  
Telephone: (212) 594-5300  
Facsimile: (212) 868-1229

Vincent M. Giblin  
KROLL HEINEMAN GIBLIN LLC  
99 Wood Avenue South, Suite 307  
Iselin, NJ 08830  
Telephone: (732) 491-2100  
Facsimile: (732) 491-2120

Lionel Glancy  
GLANCY BINKOW & GOLDBERG LLP  
1801 Ave. of the Stars, Suite 311  
Los Angeles, CA 90067  
Telephone: (310) 201-9150  
Facsimile: (310) 201-9160

Brian P. Murray  
MURRAY, FRANK & SAILER LLP  
275 Madison Avenue, Suite 801  
New York, NY 10016  
Telephone: (212) 682-1818  
Facsimile: (212) 682-1892

***Counsel for Defendants***

James E. Lyons  
Amy Park  
SKADDEN ARPS SLATE MEAGHER & FLOM LLP  
Four Embarcadero Center, Suite 3800  
San Francisco, CA 94111  
Telephone: (415) 984-6400  
Facsimile: (415) 984-2698

Eric Waxman  
SKADDEN ARPS SLATE MEAGHER & FLOM LLP  
300 S. Grand Avenue  
Los Angeles, CA 90071  
Telephone: (213) 687-5000  
Facsimile: (213) 687-5600

Paul K. Rowe  
Rachelle Silverberg  
WACHTELL, LIPTON, ROSEN & KATZ  
51 West 52<sup>nd</sup> Street  
New York, New York 10019  
Telephone: (212) 403-1000  
Facsimile: (212) 403-2000

1 ***Other Counsel***

2 Jeffrey R. Krinsk  
3 FINKELSTEIN & KRINSK  
4 501 W. Broadway, Suite 1250  
5 San Diego, CA 92101-3593  
6 Telephone: (619) 238-1333  
7 Facsimile: (619) 238-5425  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28